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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

In the Matter of	)	
	)	
Implementation of the Pay	)	
Telephone Reclassification and	)	CC Docket No. 96-128
Compensation Provisions of the	)	
Telecommunications Act of 1996	)	

COMMENTS OF THE INTELLICALL COMPANIES

THE INTELLICALL COMPANIES

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Summary

Section 276(b)(1) of the Telecommunications Act of 1996 seeks to promote the widespread deployment of payphones, to ensure the availability of services to the general public, and to promote competition generally. Intellicall wholeheartedly supports this legislation and the Commission's efforts to implement the legislative mandates.

In implementing the mandates of the Telecommunications Act of 1996, the Commission is faced with a myriad of difficult challenges. It must balance the interests of all effected parties, ensuring that any plan designed to assure "fair compensation" to payphone providers must, at the same time, be fair to other parties such as providers of debit cards, users, etc. It is incumbent upon the Commission to carefully weigh conflicting interests, making sure that any compensation ultimately adopted reflects the actual costs of providing service, as well as the value of payphone service to the ultimate payers. Similarly, any mechanism established must be enforceable to the full extent and not subject to fraudulent manipulation.

Intellicall has considered many compensation options. Intellicall believes that the costs must be either shared among all business users of interexchange services, or charged by the payphone provider to the caller on a coin-sent paid basis.

Nothing precludes the Commission from adopting either of these options.

Intellicall believes that the first option could be effected by increasing the subscriber line charge presently assessed against all business users. Intellicall believes that this is a fair and effective way of passing the costs to all those who generally benefit from the ubiquity of 800 numbers. This option would satisfy the mandates of the Communications Act of 1934, as amended by the Telecommunications Act of 1996. Other mechanisms would have a profound adverse and disparate impact upon those who subscribe to 800 service, particularly prepaid card providers, as well as the thousands of non-profit public interest/governmental agencies who rely upon 800 service to assist the public at large.

The second alternative, and one which Intellicall believes more directly comports with the principle of cost-causation, would give payphone providers the ability to charge a range of rates to the end-users who actually place access code, 800, and other calls. The Commission has broad authority under the Communications Act, as amended, to adopt this coin-based set-use fee approach. Intellicall believes that this is the only mechanism that imposes the payment obligation directly on the proper party. Indeed, the Commission has previously found that charging the end-users who originate calls from pay telephones is the "ideal solution" to payphone cost recovery. Adoption of a mechanism based on payment by anyone other than the caller results in a situation in which the carrier or the subscriber is forced to pay for a call over which it has no control.

Intellicall submits that it is incumbent upon the Commission to choose a compensation mechanism that appropriately apportions the underlying costs of service among the cost-causers. Indeed, the Commission has historically adopted a cost-causative approach in cost-allocation proceedings, and the Commission cannot now stray from that course and long-standing practice. In light of the many factors that argue against adoption of a "carrier-pays" approach to payphone compensation, the only alternatives that can fully satisfy the express mandates of the Telecommunications Act of 1996 and the Commission's competitive policies are those that spread the costs across the entire universe of potential users of pay telephones (*i.e.*, incorporate the use of the current carrier common line and subscriber line charge mechanisms) and those which permit payphone providers themselves to assess a range of rates directly against the users placing an access code, 800, or other compensable calls.

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TO: The Commission

COMMENTS OF THE INTELLICALL COMPANIES

The Intellicall Companies ("Intellicall"), by and through their undersigned counsel, hereby submit their comments in response to the Federal Communications Commission's (the "Commission") Notice of Proposed Rulemaking[1] in CC Docket No. 96-128, designed to implement Section 276 of the Telecommunications Act of 1996 related to pay telephones.[2] These comments focus on the implementation of Section 276(b)(1)(A), which requires that payphone providers receive fair compensation for all calls.

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1 In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, FCC 96-254 (rel. June 6, 1996) ("Payphone NPRM").

2 Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. §276) (the "1996 Act").

Statement of Interest

The Intellicall Companies ("Intellicall") include Intellicall, Inc. and its subsidiary companies, ILD Communications, Inc. and Intellicall Operator Services, Inc. Intellicall has since its inception in 1985 been a supplier of intelligent pay telephones and services to the independent pay telephone industry with an installed base of over 200,000 pay telephones. More recently, it has introduced a family of "smart card" reading debit phones for application in the international market accompanied by intelligent network platforms that are operational in Argentina, Thailand, Sri Lanka, Indonesia and other emerging countries.

Intellicall Operator Services, Inc. has provided operator services to the independent pay telephone industry since its inception in 1987 and currently provides such services to over 30,000 pay telephones nationwide. It entered the prepaid telecommunications market in 1994 and currently focuses on marketing private label prepaid phonecards through supermarkets and convenience store chains with regional and nationwide distribution. It also focuses on providing phonecards packaged as premiums/incentives to large and small companies who use such phonecards to promote the sales of products and services ranging from formal rentals to garage door openers.

ILD Communications, Inc. was recently formed to focus on identifying and exploiting niche market opportunities in the long distance resale market.

I. INTRODUCTION

A. Legislative Purpose

Section 276(b)(1) seeks to promote the widespread deployment of payphone and availability of a variety of services to the general public and to promote competition among payphone providers by assuring them "fair compensation for each and every call using their payphone." The only completed calls that are exempt from consideration are emergency calls and telecommunications relay service calls for hearing disabled individuals.

Intellicall wholeheartedly supports this legislation. Payphone providers are entitled to monies for all compensable uses of their payphones by the general public and this legislation, properly implemented, assures that the costs of private payphone provisioning will be spread over a greater universe of calls. (For incumbent LECs, the costs of payphone provisioning was already spread over the total universe of toll calls because the LECs received monies through the access charge regime based on minutes of use.)

In effect, this legislation eliminates the disparity between the incumbent LECs' ability to receive compensation derived from all toll calls through access, and the private providers' ability to receive compensation only from calls placed over the presubscribed carrier and from dial-around calls. The legislation wisely orders the Commission to develop a compensation methodology which will apply equally to calls placed by the general public from payphones offered by LECs and private providers.

B. Considerations In Implementing The Legislation

[NPRM ¶¶15-23] Implementation of the Act's mandate that payphone providers receive compensation for a broader category of calls presents the Commission with a myriad of difficult challenges. First, the Commission must balance the interests of other equally affected parties, including payphone manufacturers; prepaid card providers, like Intellicall; the distributors of prepaid cards, including, for example, convenience stores, gas stations and other retail outlets; as well as the interests of interexchange carriers, 800 subscriber customers, and parties originating calls from pay telephones.[3]

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[3] The Commission has consistently adhered to this principle in proceedings involving a wide variety of communications services. *See, e.g.,* Testimony of Reed E. Hundt Before the House Subcommittee on Telecommunications on the Global Information Infrastructure and the Role of Satellites, July

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For example, the prepaid phone card industry exhibits unique dynamics and characteristics that must be considered by the Commission in designing, implementing, and enforcing the per-call compensation requirement mandated by the by the 1996 Act. Any plan designed to assure "fair compensation" for payphone providers must also be "fair" to users and providers of prepaid services and not create undue cost and administrative burdens on prepaid providers. Failure by the Commission to understand and consider these vital issues in its deliberations could result in a plan that would literally destroy hundreds of providers, leaving only the largest facilities-based providers to carve up the market, thus thwarting the legislature's overarching objective of promoting competition.

Secondly, the compensation to the payphone provider should be set to reflect the actual costs of providing service and not reflect monopoly rates. The Commission must take care not to

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28, 1994 (must consider fairness both within the satellite industry and between satellite service providers and other telecommunication industry players); Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, 9 FCC Rcd 4527, 4534 n.15 (1994) (regulatory goals that should guide development of rates for regulated cable service includes balancing of interests of cable operators and consumers, producing rates that are fair and reasonable to both); Amendment of the Commission's Rules to Establish New Personal Communications Services, 8 FCC Rcd 7700, 7875 (1993) (Commission put forth proposals designed to be fair to all concerned).

impose a compensation amount out of proportion with the cost of service, and must also take care not to devise a compensation plan whose implementation costs exceed the value of such compensation and drive up the cost of providing prepaid services. Such issues as identifying from whose payphone completed calls originated, billing and collection of compensation, and dispute resolution, are, at a minimum, daunting to all but the largest prepaid service providers and presupposes a non-existent administrative infrastructure.[4]

Third, any plan devised must also be enforceable and the Commission must be prepared to take the necessary steps to ensure compliance by all so as to avoid creating cost of service irregularities that place those who do comply at a competitive disadvantage *vis-à-vis* those who do not. The prepaid service marketplace is already populated by numerous providers who routinely fail to comply with state regulatory and tax payment requirements with apparent impunity. Adding more requirements that will be ignored by these same providers will be anticompetitive.

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[4] For a discussion of the administrative burdens associated with compensation mechanisms other than a coin-based fee approach, see Section V.D. *infra*.

Lastly, the compensation plan has to be one which cannot be manipulated by unscrupulous payphone providers. For example, as discussed in further detail, *infra*, the compensation method relied upon cannot be subject to the manipulation of calls or unlawful generation of calls so as to receive greater compensation.

C. Difficulties In Implementing The Statute According To Its Terms

[NPRM ¶¶15-23] All that said, it is not clear how to devise a method of compensation which meets the Statute's literal language, that is, compensates payphone providers for every completed interstate and intrastate call, but does not compensate payphone providers for emergency calls, calls using the Telecommunications Relay for the Deaf, or uncompleted calls, and yet is otherwise fair to all other industry participants.

For example, technically, a call to a 1-800 prepaid service platform is one call; and the call from the prepaid platform to the end user a second call. However, these two calls comprise just one call for regulatory purposes, as well as from the consumer's perspective.[5]

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[5] *See e.g.*, *Long Distance/USA, Inc.*, *et al.* v. *The Bell Telephone Co. of Pennsylvania*, *et al.*, 7 FCC Rd 408, 412 (1992) (recognizing end-to-end nature of communication). From a consumer's perspective, the only concern is the
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There is no circumstance today where the call to the platform is a billable call to the end user. Yet either the coin-sent paid solution, or the carrier pays solution if interpreted to permit the IXC to pass the cost through to only the specific subscriber who received a call from pay telephones would yield that result. With the coin-sent paid solution, private payphones will see the call to the 800 platform as a completed call, and, even if the call does not make it past the platform (*e.g.* insufficient funds, improper billing information, etc.), that call will incur a pay station charge if 1-800 calls are compensable at the phone. This result does not necessarily comport with the statutory requirement that payphone providers be compensated for "completed calls" unless "completed call," for purposes of Section 276, is interpreted differently than it traditionally has been for regulatory purposes.[6] However, any attempt to re-define "completed call" from both a regulatory and

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ability to have a conversation between the calling and called party.

6 *See id.* (Common Carrier Bureau has determined that an 800 service credit card call that is routed through an IXC's switch should not be viewed as two calls, and that the switch was merely an intermediate step in a single, end-to-end communication); Southwestern Bell Telephone Co., 3 FCC Rcd. 2339, 2341, (1988) (for jurisdictional purposes, 800 credit card traffic does not terminate at the IXC's credit card switch, rather, the credit card switch is an intermediate step in single end-to-end communications).

consumer perspective will result in a windfall to the payphone provider (who will get the coin in the box for calls that never made it past the provider's switch), and a loss to the consumer (who will pay for a call that never reached the called party).

Furthermore, if the charge is placed on the IXCs, and passed through directly to the 800 provider who handled the call, prepaid providers will have no way of receiving payment for either uncompleted calls, for which they would be charged, or even those calls that are completed to the prepaid card holder's called party. In order to pass through the pay station charge in whatever form it is assessed to the calling party, prepaid providers need to know the call is from a payphone and the level of the charge being assessed in real time. But there is no on-line data base of payphones presently in existence, or to Intellicall's knowledge, contemplated at this time. Without that, prepaid providers like Intellicall would have no way to charge their customers, for whom the costs of each call placed are debited from the card at the time of the call.

Clearly the statute cannot be interpreted to compensate payphone providers for the use of their phones by the calling party, but deprive the prepaid provider to whom the charge would be passed through from the IXC of a means of compensation for these exact calls.

After consideration of the tensions between and among each of the options Intellicall has considered, Intellicall believes that either the costs must be shared among all business users of interexchange services or, despite all of the following option's imperfections, it must be charged by the payphone provider to the caller on a coin-sent paid basis, subject to certain exceptions described below. Clearly, the solution which does not pass muster under the Communications Act is the application of the existing per call arrangement devised solely as a means of compensating payphone providers for operator assisted dial around traffic, or the pass through of any charges to the 800 subscribers.

II. DESCRIPTION OF THE PREPAID PHONE INDUSTRY

In reaching its decision as to how to implement Section 276, it is incumbent upon the Commission to understand the feasibility of implementing the specific Commission plans by affected industries and the impact of each of these plans on specific industry segments. The following paragraphs describe the prepaid (or debit) card industry, in general, as well as the technical underpinnings of the service. From this description, the Commission can draw conclusions regarding the impact of its various proposals and better devise a plan which allows payphone providers fair compensation without gouging the prepaid industry, a result which Congress clearly did not intend in ordering compensation to payphone providers for the use of the pay telephone, *per se*.

A. The Prepaid Marketplace

1. Generally

The prepaid phone card industry has experienced rapid growth since its inception in about 1992. Current estimates of its size vary considerably depending on the audience but indicate market size exceeding $500,000,000 in 1996, increasing to around $800,000,000 over the next few years. Primary market segments are retail, premium/incentive and, to a significantly lesser extent, collectibles. The primary reason for such phenomenal growth is that the technology for the first time provides a means for packaging and distributing long distance service packets to meet a variety of needs in each market segment.

Prepaid debit services have long been available in Europe, Asia, and the Middle East, and depend on the ubiquitous availability of smart-card reading phones (typically payphones) since account balances are maintained in the smart card itself. In the United States, no such network of "smart-card" reading payphones is available. The provision of prepaid services has thus developed as "remote memory" services wherein account balances are maintained in a centralized debit card service switching platform accessible through toll-free service from any touch-tone telephone, including touch-tone pay telephones.

Prepaid phone cards feature flat (or postalized) rates regardless of time of day or distance with no operator charge as is common with coin-sent paid, collect, and calling card calls. Each card includes dialing instructions, an "800" or "888" toll-free access number, an account or PIN number that identifies the user to the platform.

To enhance their service offering, prepaid service providers provide toll-free access to customer service representatives to assist card holders in obtaining the services and to respond to the full range of questions that arise in the normal course of business. Such calls, of course, are non-revenue producing calls and, in fact, some state commissions require such service to be free-of-charge.

2. Retail Applications

Prepaid telecommunications services sold as phone cards in retail venues are intended for use by consumers as a competitive alternative to other forms of direct-dialed and operator-assisted calls. The phone cards are typically available with initial account values of $5.00, $10.00, $20.00, and $50.00, and can be "recharged" (or additional time purchased) by charging the desired amount to a credit or bank card and, in some venues, at the retail location by cash payment. With a phone card, individuals are able to purchase only the service they need and can afford, regardless of whether they have an account with a local exchange or interexchange carrier. Short of obtaining service for free, prepaid telecommunications approximate truly universal service, a goal of most public utility commissions, the Congress, and the Commission.

Competition has resulted in lower retail rates and increased availability. Since their introduction in 1992, the retail prices of prepaid telecommunications has steadily declined. Initial offerings by AT&T, MCI and Sprint featured postalized rates of $0.60 per minute. Rates ranging between $0.25 and $0.35 per minute are now commonplace. Thus, with a phone card, one can place a three-minute call for less than just the operator surcharge would cost, with virtually all intrastate carriers.

Since most providers have no retail distribution outlets of their own on a regional, much less national scope, providers have entered into distribution arrangements with supermarket, pharmacy and convenience store chains, including Fred Meyer, Krogers, Toot'n Totum, Eckards, WalGreens, Albertsons, 7-11, Western Family and Shurfine as examples. These entities typically purchase phone cards from the actual service provider at less than face value (discount of 40% to 55% are not atypical) that creates a margin for them to cover marketing and distribution costs and generate a profit. They market custom designed phone cards featuring their name and/or logo combined with defining artwork and promotional audio messages.

Phone cards are sold at retail from the cash register, convenience desk, vending machines, and other venues depending on retailer choice and available space. Retailers are typically provided a variety of point-of-sale materials by the service provider that include window banners, wall posters, ceiling danglers, tent cards, buttons, and the like, to make the customers aware of the product and the opportunity for savings and convenience. Other expenses incurred in phone card marketing, typically shared by the retailer and the service provider, include radio and television advertising, newspaper ads, and promotional phone cards given away to expose consumers to the prepaid concept.

3. Premium/Incentive Applications

Millions of Americans have and continue to get phone cards as a free premium/incentive/reward for trying a new product or service, purchasing a product or service, answering survey questions, and numerous other applications. Companies as diverse as Ethel M Chocolates, Anderson's Formalwear, Riviana Foods, Dow Corning, Ryder Trucks, BeautiControl Cosmetics, Exxon, Shell, and General Foods have all found that phone cards offer a unique way to package long distance service on a so-called "mini-billboard" in order to promote/advertise on every call with a series of audio messages.[7]

4. Collectible Market

The collectible market for prepaid phone cards had its genesis in Europe and Asia where collection, trading and sales of phone cards is a thriving market. Similar to baseball trading cards, collectible phone cards are typically issued in limited editions and in a series with photographs of famous personalities, endangered species, comic book characters, sports figures and other images anticipated to enhance their perceived collectibility. Unlike retail cards, collectible cards are not necessarily purchased to obtain long distance services but for the same reasons that individuals purchase stamps, coins, commemorative plates, and other collectibles. Prices for such cards vary widely and may bear little if any relation to the actual amount of phone time provided since issuers typically incur significant fees and royalties associated with the rights to use names and likenesses that must be recovered over the limited number of cards produced.

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[7] The premium/incentive phone cards typically provide anywhere from 5 to 60 minutes of free long distance to the recipient and are typically priced to the issuer below actual cost with the anticipation that not all the available time will be used and thus make the product price competitive with more traditional, high-volume premiums/incentives, *e.g.*, T-shirts, coffee mugs, address labels, and the like.

5. Anatomy of a Prepaid Telephone Call

As with most, if not all, telecommunications service other than direct dial calls completed by consumers, prepaid services actually consist of two calls from a network standpoint. The first call is placed over toll-free network facilities (*e.g.*, 800-NXX-XXXX) by the end user from the originating telephone to the service provider's platform and is always completed to the platform. Although the called number is actually entered by the end user, the second call is actually placed by the service platform to the called telephone number entered by the end user and is completed only if the called party station answers. It must be noted, however, that for regulatory purposes, such calls have historically been considered one call with those originating and terminating in the state in which the provider's platform is located.

III. THE COMMISSION HAS BROAD AUTHORITY TO IMPLEMENT EITHER A COMPENSATION PLAN THAT SPREADS COSTS AMONG ALL BUSINESS USERS OR A COIN-SENT PAID PLAN

[NPRM ¶¶15-23] Congress gave the Commission broad authority to

> prescrib[e] regulations that establish a per call compensation plan to ensure that payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone . . .[8]

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[8] 47 U.S.C. § 276(b)(1)(A).

The statute does not specify the type of compensation plan that the Commission should adopt, nor does it define, for example, what is meant by "fair" compensation or "completed" call. Rather, it gives the Commission a broad and general mandate to adopt a compensation plan that it determines is appropriate and consistent with the public interest goals that Congress intended to promote.

Allowing the Commission flexibility to promulgate regulations pursuant to the statute it is charged with implementing is both logical and well-grounded in the law.[9] This is particularly true when a statute contains ambiguities, such as the lack of definition or guidance evident in Section 276.[10]

Moreover, the Commission has broad discretion in selecting regulatory tools. This broad discretion permits the Commission

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[9] *See Mississippi Power & Light Co. v. Mississippi ex. rel. Moore*, 487 U.S. 354 (1988)(concurring opinion)("It is plain that giving deference to an administrative interpretation of its statutory jurisdiction or authority is both necessary and appropriate"); *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973)(broad rulemaking authority vested in administrative agencies to achieve flexibility).

[10] *Pauley v. Bethenergy Mines Inc.*, 501 U.S. 680 (1991)(citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 866 (1984))(deference to agency interpretation appropriate when ambiguity exists in statute it is authorized to implement and Congress has delegated policy making authority to the agency).

to reasonably select from the available alternatives. Similarly, it may amend existing regulatory methods to implement statutory objectives either with or without a change in circumstances.[11]

IV. ALL BUSINESS USERS SHOULD BE ASSESSED FOR PAY TELEPHONE COMPENSATION

A. 800 Service Availability Benefits The General Public

[NPRM ¶¶15-23] The proliferation of 800 services has resulted from the substantial benefits such services provide to the general public. This is perhaps most evident from the number and the type of subscribers who can be accessed via 1-800. There were over 6,987,063 800 numbers in use as of December 1995, with millions more toll free numbers in reserve and/or to be available for use as of March 1996.[12]

800 subscribers use their numbers for ease of access. There is a significant diversity in the actual identity of 800 subscribers, but clearly many 800 subscribers are commercial establishments; federal, state and local governmental agencies; as well as both public and private public service "hot lines." The bulk of 800 subscribers are comprised of businesses that use

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11 *See* Polices and Rules Concerning Rates for Dominant Carriers, Further Notice of Proposed Rulemaking, CC Docket No. 87-313, 3 FCC Rcd 3195, 3297 (1988).

12 Trends in Telephone Service, Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, 1996 FCC LEXIS 2570 (1996).

800 services as a convenience to their customers for marketing purposes and customer services. A sampling of the governmental agencies that use 1-800 include the FCC (Consumer Assistance Office); the Social Security Administration (*e.g.*, all Metropolitan Virginia, Maryland assistance offices access through 800); the Immigration and Naturalization Service (*e.g.*, General Information relating to Legalization); the Internal Revenue Service (*e.g.*, Federal Tax Forms; Federal Tax Information and Assistance); the Interior Department (Employment Office), the Labor Department, The Peace Corps (General Information); the Small Business Administration (Answer Desk), and the Office of Veterans Affairs.

Other key subscribers are those offering information dissemination and assistance services, including the AIDS Hotline and AIDS Information Clearing House, and the National Domestic Violence Hotline. These are in addition to the millions of businesses and individuals that use 1-800 access; one source in fact claims that "consumers no longer view toll-free numbers as a bonus, but as a necessity." S. Cook. *Public Communications Magazine*, May 1996 at 18.

Callers to these services are equally ubiquitous. "[N]ine out of ten Americans say that they use toll free numbers and more than a third estimate that they dial 1-800 more than 60 times a year." *Id.* Based on the diversity of companies, governmental